Neutral Citation Number: [2019] EWCA Civ 1402

Case No: A2/2018/0825

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE EMPLOYMENT APPEAL TRIBUNAL
HH Judge Barklem
UKEAT/0102/17

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06/08/2019

Before :

LORD JUSTICE UNDERHILL
(Vice-President of the Court of Appeal (Civil Division))
LORD JUSTICE HAMBLEN
and
LORD JUSTICE MOYLAN

- -

Between :

THE HARPUR TRUST	**Appellant**
- and -	
LESLEY BRAZEL	**Respondent**
- and -	
UNISON	**Intervener**

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Mr Caspar Glyn QC and **Mr Nathan Roberts** (instructed by **VWV Solicitors**) for the **Appellant**
Mr Lachlan Wilson and **Mr Mathew Gullick** (instructed by **Hopkins Solicitors**) for the **Respondent**
Mr Michael Ford QC and **Mr Mathew Purchase** (instructed by **Shantha David**, **Unison Legal Services**) for the **Intervener**

Hearing date: 2 May 2019

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Lord Justice Underhill:

INTRODUCTION

1. The Claimant, who is the Respondent to this appeal, is a clarinet and saxophone teacher. She is employed by the Appellant ("the Trust"), which runs Bedford Girls School, as a "visiting music teacher". That label means that she does not have a set number of working hours. The hours that she works in a given school term depend on the number of pupils requiring tuition in her instruments. In the periods which give rise to her claim she would typically give between twenty and thirty half-hour lessons per week. There are also some ancillary duties, for some but not all of which she is separately remunerated. She gives no lessons in the holidays and has no other substantial duties then. She is paid monthly on the basis of an agreed hourly rate applied to the hours worked in the previous month. The length of the school terms, taken together, varies from year to year: this can total as few as 32 weeks or as many as 35. For working purposes I will take a figure of 32.

2. I should make a couple of points about how the Claimant's employment is to be characterised, since labels in this area can be confusing:

   (1) She is not a casual employee in the sense that she is employed only lesson-by-lesson or indeed term-by-term. On the contrary, she is employed under a permanent, in the sense of continuing, contract of employment, albeit one where the Trust is not obliged to provide a fixed minimum amount of work and pays only for the work done – in the jargon, a zero-hours contract. But she is in an equivalent position to a casual employee to the extent that the hours which she works, and which generate her entitlement to be paid, vary both from term to term and as between term-time and holidays.

   (2) She can be described as a part-time employee, but it is important in the interests of clear analysis to appreciate that that is so in two distinct senses – first, that she does not work a full working week and, second, that for large parts of the year, i.e. the school holidays, she has no work (at least for the Trust) at all. It is the second sense that matters for the purpose of this case. There is (so far as I know) no ready-made label for that kind of part-time work: I will coin the terms "part-year worker" and, for its opposite, "full-year worker".[1]

3. Since the Claimant is a worker within the meaning of the Working Time Regulations 1998 ("the WTR") she is entitled (subject to the issues considered below) to 5.6 weeks paid annual leave. Her contract of employment likewise says "you will be entitled to

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[1] The phrase "term-time worker" does appear in the ACAS Guidance to which I refer below, and I dare say may be used more generally, but I have eschewed it for two reasons. First, it may tend to suggest a worker who is only employed during the term, whereas the Claimant is, as explained above, employed all the year round, albeit that she only has work, and thus (by contrast with salaried teachers) only earns, during the term. Secondly, it is too narrow. Although schools and universities may be the main employers of part-year workers, there are other areas of the economy where work is periodic but where employers choose to retain employees on continuing contracts – Lord Hope gives several examples at para. 39 of his judgment in *Russell v Transcocean International Resources*, to which I refer at para. 57 below.

5.6 weeks paid holiday". Since the school holidays are far longer than that neither she nor the Trust have thought it necessary explicitly to designate any particular parts of them as statutory leave; but, by agreement, the Trust makes three equal payments in respect of her leave at the end of April, August and December.

4. The only issue now live is how the Claimant's payments in respect of annual leave pursuant to the WTR should be calculated. The Employment Tribunal adopted a method more favourable to the Trust, but on appeal the Employment Appeal Tribunal substituted a method more favourable to her.

5. The Trust has been represented before us by Mr Caspar Glyn QC, leading Mr Nathan Roberts, and the Claimant by Mr Lachlan Wilson, leading Mr Mathew Gullick. Both Mr Glyn and Mr Wilson appeared in both the ET and the EAT. Because the appeal raises an issue of general importance about the calculation of holiday pay[2] entitlement, the trade union UNISON has been given permission to intervene. It has been represented by Mr Michael Ford QC, leading Mr Mathew Purchase; and it was in fact Mr Ford who took the lead in supporting the decision of the EAT.

6. Mr Glyn was at pains in his submissions to say that notwithstanding this dispute the Claimant remains employed by the Trust and is a valued member of staff.

THE RELEVANT LEGISLATION

THE EU LEGISLATION

7. The WTR were originally made pursuant to the UK's obligations under the EU Working Time Directive ("the WTD"). The version of the WTD currently in force is 2003/88/EC, but this replaces an earlier directive, 93/104/EC, which had undergone various amendments. The provision of the WTD relating to annual leave is article 7 which reads:

> "1. Member States shall take the measures necessary to ensure that every worker is entitled to paid annual leave of at least four weeks in accordance with the conditions for entitlement to, and granting of, such leave laid down by national legislation and/or practice.
>
> 2. The minimum period of paid annual leave may not be replaced by an allowance in lieu, except where the employment relationship is terminated."

It will be seen that article 7 does no more than set out the bare minimum requirements, detailed implementation being left to member states. There has, however, been a fair amount of case-law in the CJEU which identifies principles that such implementing legislation has to respect.

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[2] The legislation uses the terms "annual leave" and "paid annual leave", but they can be rather clunky to use, and I will sometimes say "holiday" or "holiday pay", without intending any difference of meaning.

8. The only other article of the WTD to which I need refer is article 15, which provides that member states are entitled to make more favourable provision with regard to annual leave.

9. Article 31 of the EU Charter of Fundamental Rights also includes a provision that every worker has the right to "an annual period of paid leave", but that adds nothing material for our purposes.

THE WORKING TIME REGULATIONS

10. I should note by way of preliminary that the WTR in their current form will be amended with effect from 6 April 2020 by the Employment Rights (Employment Particulars and Paid Annual Leave) Regulations 2018. None of the amendments directly impacts on any of the issues before us.

11. The key provisions of the WTR for our purposes are regulations 13, 13A and 16. Regulations 13 and 13A confer the right to annual leave and regulation 16 provides for the worker to be paid for that leave. Taken together, regulations 13 and 16 are the primary provisions intended to implement article 7 of the WTD; regulation 13A has a different source, as will appear.

12. The decision of the draftsman to split the requirements of article 7 out into the entitlement to leave and the entitlement to be paid recognises that the two rights, however inter-related, are analytically distinct. That has also been recognised by the CJEU in its consideration of article 7: see the case of *Hein* referred to at paras. 47-52 below. It is important in the interests of clear thinking to consider them separately.

13. Regulation 13 is headed "Entitlement to annual leave". Paragraph (1) reads:

> "Subject to paragraph (5), a worker is entitled to four weeks' annual leave in each leave year."

"Leave year" is defined in paragraph (3), but nothing turns on that for our purposes. I should also set out paragraphs (5) and (9), which read as follows:

> "(5) Where the date on which a worker's employment begins is later than the date on which (by virtue of a relevant agreement) his first leave year begins, the leave to which he is entitled to in that leave year is a proportion of the period applicable under paragraph (1) equal to the proportion of that leave year remaining on the date on which his employment begins.
>
> …
>
> (9) Leave to which a worker is entitled under this regulation may be taken in instalments, but –
>
> (a) it may only be taken in the leave year in respect of which it is due, and
>
> (b) it may not be replaced by a payment in lieu except where the worker's employment is terminated."

14. The four-week entitlement under regulation 13 was supplemented, with effect from 1 October 2007, by a new regulation 13A conferring entitlement to "additional annual leave" expressed as amounting to "1.6 weeks". This was intended to prevent bank holidays being counted against the statutory entitlement to annual leave: 1.6 weeks represents eight working days, there being eight bank holidays in a year. That purpose is also reflected in paragraph (3), which provides that the aggregate entitlement under regulations 13 and 13A is subject to a maximum of 28 days. Since the additional period of leave is not a requirement of EU law, the regulations which introduced regulation 13A – the Working Time (Amendment) Regulations 2007 – are made under powers conferred by the Work and Families Act 2006, whereas the remainder of the WTR are made under section 2 of the European Communities Act 1972.

15. I turn to regulation 16, which is headed "Payment in respect of periods of leave". It reads, so far as material:

> "(1) A worker is entitled to be paid in respect of any period of annual leave to which he is entitled under regulations 13 and 13A, at the rate of a week's pay in respect of each week of leave.
>
> (2) Sections 221-224 of [the Employment Rights Act 1996] shall apply for the purpose of determining the amount of a week's pay for the purposes of this regulation, subject to the modification set out in paragraph (3).
>
> (3) The provisions referred to in paragraph (2) shall apply—
>
> (a) as if references to the employee were references to the worker;
>
> (b) as if references to the employee's contract of employment were references to the worker's contract;
>
> (c) as if the calculation date were the first day of the period of leave in question; and
>
> (d) as if the references to sections 227 and 228 did not apply.
>
> (4)-(5) …."

I come back at paras. 19-23 below to the provisions of the 1996 Act incorporated by paragraph (2).

16. Although those are the primary provisions with which we are concerned I need to note two other regulations to which reference was made in the submissions before us.

17. The first is regulation 14. As will have been noted, article 7.2 of the WTD permits a payment in lieu to be made if, but only if, the worker's employment terminates during a leave year. Regulation 14 makes provision for such a case. I need not set it out in full. Paragraph (2) reads:

> "Where the proportion of leave taken by the worker is less than the proportion of the leave year which has expired, his employer shall make him a payment in lieu of leave in accordance with paragraph (3)."

Paragraph (3) provides that such a payment may be provided for in a "relevant agreement", but that in the absence of such agreement it shall be

> "… a sum equal to the amount that would be due to the worker under regulation 16 in respect of a period of leave determined according to the formula —
>
> (A x B) - C
>
> where —
>
> **A** is the period of leave to which the worker is entitled under regulation 13(1) and regulation 13A;
>
> **B** is the proportion of the worker's leave year which expired before the termination date, and
>
> **C** is the period of leave taken by the worker between the start of the leave year and the termination date."

18. The second is regulation 15A. In their original form the WTR provided that no entitlement to annual leave accrued until a worker had been employed for thirteen weeks. In *R (BECTU) v Secretary of State for Trade and Industry* C-173/99, [2001] 1 WLR 2313, the CJEU held that that provision was contrary to article 7 of the WTD. The WTR were amended accordingly, but it was thought necessary to make special provision for entitlement to leave during the first year of employment. Regulation 15A, as subsequently amended, reads (so far as material):

> "(1) During the first year of his employment, the amount of leave a worker may take at any time in exercise of his entitlement under regulation 13 or regulation 13A is limited to the amount which is deemed to have accrued in his case at that time under paragraph (2) or (2A), as modified under paragraph (3) in a case where that paragraph applies, less the amount of leave (if any) that he has already taken during that year.
>
> (2) …
>
> (2A) Except where paragraph (2) applies, for the purposes of paragraph (1), leave is deemed to accrue over the course of the worker's first year of employment, at the rate of one-twelfth of the amount specified in regulation 13(1) and regulation 13A(2), subject to the limit contained in regulation 13A(3), on the first day of each month of that year.
>
> (3) Where the amount of leave that has accrued in a particular case includes a fraction of a day other than a half-day, the fraction shall be treated as a half-day if it is less than a half-day and as a whole day if it is more than a half-day.
>
> (4) …"

"A WEEK'S PAY"

19. Sections 221-224 of the 1996 Act, incorporated by regulation 16 (2), form part of Chapter II of Part XIV of the Act, which is headed "A Week's Pay" and comprises sections 220-229. Those provisions have a long history in British employment legislation. The concept of "a week's pay" was introduced initially by the Contracts of Employment Act 1963, which conferred a statutory right to a minimum period of notice of the termination of a contract of employment. It is now relevant also to the calculation of redundancy payments and the basic award for unfair dismissal compensation and other cognate rights.

20. I need not set out sections 221-224 in their entirety. They contain different provisions for the calculation of a week's pay in four different cases. The first three (covered by sections 221-222, supplemented by section 223) are variants of situations where there are "normal working hours" ("NWHs"), which need not be full-time or require working every week. The fourth (covered by section 224) applies where there are no NWHs. I need not set out sections 221-223, but I should identify the three cases which they cover:

    (a) where the worker's pay does not vary according to either the amount of work done or the time at which it is done (section 221 (2));

    (b) where the pay varies according to the work done, as under a piece-work pay system (section 221 (3));

    (c) where the rate of pay varies according to when the hours are worked, e.g. for workers working variable shift patterns where the night shift attracts a higher rate (section 222).

    In case (a) a week's pay is, straightforwardly, the amount payable if the worker works his or her NWHs for a week. In cases (b) and (c) an average is taken based on their remuneration over the previous twelve weeks.

21. It is common ground in these proceedings that the Claimant has no normal working hours within the meaning of the statute, and accordingly that section 224 applies. It reads:

> "(1) This section applies where there are no normal working hours for the employee when employed under the contract of employment in force on the calculation date.
>
> (2) The amount of a week's pay is the amount of the employee's average weekly remuneration in the period of twelve weeks ending –
>
> (a) where the calculation date is the last day of the week, with that week, and
>
> (b) otherwise, with the last complete week before the calculation date.
>
> (3) In arriving at the average weekly remuneration no account shall be taken of a week in which no remuneration was payable by the employer to the employee and remuneration in earlier weeks shall be brought in so as to bring up to twelve the number of weeks of which account is taken.

> (4) This section is subject to sections 227 and 228."

It will be recalled that regulation 16 (3) provides that the "calculation date" is "the first day of the period of leave in question" and that the reference to sections 227 and 228 is disapplied. (One of the changes to be made by the 2018 Regulations is that the twelve-week reference period in section 224 (2) becomes, subject to various refinements, one year.)

22. I should note that there is a potential ambiguity in section 224 (2), and specifically in the phrase "weekly remuneration *in* [the twelve-week reference period]". That phrase could refer either to remuneration which is actually *paid* (or in any event payable[3]) in the period or to pay which is *earned* in the period even if it only becomes due at some later point. In the case of workers with regular hours who are paid either weekly or monthly (as is almost always the case) both readings would have the same effect: even if the reference is to pay-days, they would catch twelve weeks' of representative earnings. But section 224 is concerned with workers who are not working regular hours, and there could therefore be circumstances in which the amounts paid in the reference period do not correspond, even broadly, to the amounts earned in it. No point on this arises in this appeal, and although the question was raised with counsel in oral submissions, we did not receive developed submissions about it. I am inclined to think that the intended reference must be to amounts earned rather than amounts paid/payable.[4] I have to acknowledge that the phrase in sub-section (3) "a week *in which* no remuneration was payable" might point in the other direction, but the context might allow it to be read as meaning "in respect of which"[5]. I will in what follows refer to remuneration "earned" in the reference period, but I should not be treated as expressing a definitive view.

23. Finally, I should refer to section 229 of the 1996 Act, which is not expressly incorporated by regulation 16 but falls under Chapter II and is relevant to one of the Trust's submissions. It is headed "Supplementary" and reads, so far as material:

> "(1) …
>
> (2) Where under this Chapter account is to be taken of remuneration or other payments for a period which does not coincide with the periods for which the remuneration or other payments are calculated, the remuneration or other payments shall be apportioned in such manner as may be just."

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3 The intention cannot have been that an employer should benefit from a failure to pay remuneration when due, and that is confirmed by the use of "payable" in sub-section (3).

4 That also appears to have been the understanding of the CJEU on a reference from the UK about earnings from sales commissions: see *Lock v British Gas Trading Ltd* C-539/12, [2014] ICR 813, at para. 20 of the judgment of the Court (p. 825 E-F).

5 I note that in sections 221 (3) and 222 (3), which likewise provide for an averaging exercise where the rate of pay is variable, the phrase used is "payable … *in respect of* the relevant period of twelve weeks". It is hard to see why a different approach should be taken where the variable element is the hours rather than the rate.

THE PART-TIME WORKERS DIRECTIVE

24. For reasons which will appear, I need to refer to the EU Part-Time Workers Directive ("the PTWD"), Council Directive 97/81/EC. This implements a Framework Agreement on Part-Time Work agreed between three European cross-industry organisations: the Agreement is annexed to the Directive. Clause 3 of the Agreement defines a part-time worker as follows:

> "1. The term 'part-time worker` refers to an employee whose normal hours of work, calculated on a weekly basis or on average over a period of employment of up to one year, are less than the normal hours of work of a comparable full-time worker.
>
> 2. The term 'comparable full-time worker` means a full-time worker in the same establishment having the same type of employment contract or relationship, who is engaged in the same or a similar work/occupation, due regard being given to other considerations which may include seniority and qualification/skills."

25. The essential principle of the Framework Agreement, and thus of the Directive, is that employers should not discriminate between part-time and full-time workers. This is expressed in clause 4, paragraphs 1 and 2 of which read:

> "1. In respect of employment conditions, part-time workers shall not be treated in a less favourable manner than comparable full-time workers solely because they work part time unless different treatment is justified on objective grounds.
>
> 2. Where appropriate, the principle of *pro rata temporis* shall apply."

As will appear, Mr Glyn attaches importance to the provision at paragraph 2 that "the principle of *pro rata temporis*" shall apply in ascertaining the rights of part-time workers.

26. The PTWD is implemented in the UK by the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 ("the PTWR"), but I need not refer to any of their provisions here.

THE ISSUE

27. The system for the payment of visiting music teachers at the school changed with effect from 1 September 2011. The Trust has since that change approached the calculation of the three annual payments of holiday pay referred to in para. 3 above in accordance with a method recommended by ACAS in its guidance booklet *Holidays and Holiday Pay* for calculating the pay of casual workers. The relevant passage, at p. 6 of the booklet, reads:

> "**What leave do casual workers get?**
> If a member of staff works on a casual basis or very irregular hours, it is often easiest to calculate holiday entitlement that accrues as hours are worked.

> The holiday entitlement of 5.6 weeks is equivalent to 12.07 per cent of hours worked over a year.
>
> The 12.07 per cent figure is 5.6 weeks' holiday, divided by 46.4 weeks (being 52 weeks – 5.6 weeks). The 5.6 weeks are excluded from the calculation as the worker would not be at work during those 5.6 weeks in order to accrue annual leave."

As I read it, though it is not entirely clear, that guidance is directed at the case of casual workers in the sense of workers who are not retained by the employer between periods of work.[6] In any event the Trust has followed the approach set out and has proceeded on the basis that it feeds into the calculation of holiday pay, simply calculating the Claimant's earnings at the end of a term and paying her one-third of 12.07% of that figure.

28. It is the Claimant's case that that method bears no relation to the calculation required by the WTR and produces a lower figure. The required calculation is a straightforward matter of arithmetic. By virtue of regulation 16 (1), which incorporates section 224, you calculate a week's pay by taking the average weekly remuneration for the twelve weeks prior to the calculation date[7]; and then, by virtue of regulations 13 and 13A, multiplying it by 5.6. There is nothing in the relevant provisions requiring a different approach where the worker does not work a full year.

29. The Trust accepts that its method necessarily produces a lesser entitlement to annual leave/pay[8] than the Claimant's. But it says that it gives effect to a "principle of pro-rating" which underlies the legislation and which, on its true construction, it incorporates.

30. In short, therefore, the essential difference between the parties is whether the calculation of the Claimant's holiday entitlement or holiday pay should be pro-rated to that of a full-year worker in order to reflect the fact that she does not work throughout the year.

THE PROCEEDINGS

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6 Intriguingly, the immediately following section in the booklet is headed "What leave do term-time workers get?". However, all in substance that it says is that "there is no specific calculation for working out the holiday entitlement of term-time workers".

7 I should mention one wrinkle. As noted at para. 3 above, the parties have not in practice bothered to specify when a particular period of annual leave occurs. However, the natural interpretation of the practice of making the three annual payments referred to is that one-third of the annual leave entitlement is taken at the start of each of the spring, summer and Christmas school holidays. Even if for some reason it were thought right to treat the annual leave as occupying the final period of the holiday, it would make no difference, since by virtue of section 224 (3) the earlier weeks would not be counted because nothing was payable in them.

8 I say "leave/pay" advisedly. As will appear, the Trust's submissions contemplate that either may be the appropriate subject for the pro-rating for which it argues.

31. The Legal Adviser to the Incorporated Society of Musicians took up the Claimant's complaint with the Trust, but it maintained that its approach to the calculation of her holiday pay was correct. The Claimant used the Trust's grievance procedure, but without success.

32. In March 2015 the Claimant presented a complaint in the ET under Part II of the 1996 Act for unlawful deductions from her wages by underpayment of her entitlement to holiday pay. (She in fact presented four more complaints over the next year or so, in order to keep up with the continuing underpayments, but all five were consolidated.) She also advanced a claim under the PTWR, distinct from her claim under the WTR.

33. By a Judgment and Reasons sent to the parties on 15 January 2017 an Employment Tribunal at Bury St Edmunds chaired by Employment Judge Laidler dismissed the Claimant's claims. It held at paras. 94-98 of its Reasons that the application of a figure of 12.07% to either the length of the holiday entitlement or to what it described as the Claimant's "average pay over the course of the working year of 46.4 weeks" would give her proportionately the same holiday pay entitlement as a full-year worker. It accepted Mr Glyn's submission that it was necessary to construe the WTR as if regulation 16 (3) (d) read:

> "[Sections 221-224] shall apply … as if the references to sections 227 and 228 did not apply *and, in the case of the entitlement under regulation 13 where a worker has no normal hours and works 46.4 weeks per year, any such payments should be capped at 12.07% of annualised hours*."

(I have reproduced this as it appears, but I think the words "less than" may have been omitted from before "46.4 weeks".) At para. 99 the Tribunal held that if that approach was wrong the figure of 5.6 weeks should be directly pro-rated. It gave a table setting out the appropriate discount depending on the exact number of weeks between 32 and 35 that the Claimant worked: for 32 weeks it was 0.69 (being the ratio 32:46.4) and an entitlement of 3.86 weeks. Although we were not taken through the arithmetic the tribunal seems to have understood that either approach would produce substantially the same amounts in terms of holiday pay

34. The Claimant appealed to the EAT, though only as regards the claim based on the WTR. By a judgment handed down on 6 March 2018 HH Judge Barklem (sitting alone) allowed her appeal, essentially on the basis that there was no warrant for departing from the plain statutory language: see in particular paras. 42-43 of his judgment. He remitted the case to the ET to work out the amounts owing to her on the basis for which she contended. This is an appeal against that decision.

35. Without disrespect to either of the tribunals below, since the issue is one of pure law I will not summarise the detailed reasoning leading to their conclusions and will proceed to my own analysis. It is most convenient to start with the Trust's case.

THE TRUST'S CASE

36. The structure of Mr Glyn's sophisticated and lucid submissions was, first, to establish that there was "a principle of pro-rating" which the WTR should be taken to be intended to apply; and, secondly, to propose means by which that principle could be given effect

to in a manner consistent with the terms of the WTR (and/or those of the incorporated provisions of the 1996 Act). I take those two stages in turn.

(1) THE FUNDAMENTAL SUBMISSION: WHY PRO-RATING IS REQUIRED

37. Mr Glyn submitted that pro-rating of the Claimant's holiday/holiday pay entitlement in order to reflect the fact that she only works part of the year was necessary both because that was a requirement of EU law and also, as a matter of domestic law, in order to avoid what he characterised as obviously unjust results which cannot have been intended.

The EU Law Case

38. Mr Glyn referred us to six decisions of the CJEU. The first was *Zentralbetriebsrat der Landeskrankenhäuser Tirols v Land Tirol* C-486/08, [2010] IRLR 631. That concerned the compatibility of Austrian legislation with the PTWD. So far as relevant to our purposes, the legislation provided that where a full-time worker moved to part-time working any entitlement to paid annual leave that they had accrued but not yet taken should be reduced proportionately to the reduction in hours. The Court held at paras. 32-33 of its judgment (pp. 635-6) that the principle of *pro rata temporis* in clause 4.2 of the Framework Agreement applied so as to reduce the entitlement to annual leave, though that could not operate as regards entitlement already accrued. As it put it at para. 33:

> "… [I]t is indeed appropriate to apply the principle of pro rata temporis, set out in Clause 4.2 of the framework agreement on part-time work, to the grant of annual leave for a period of employment on a part-time basis. For such a period, the reduction of annual leave by comparison to that granted for a period of full-time employment is justified on objective grounds. However, that principle cannot be applied ex post to a right to annual leave accumulated during a period of full-time work."

That ruling was applied as regards substantially identical German legislation in *Brandes v Land Niedersachsen* C-415/12.

39. In *Heimann v Kaiser GmbH* C-229/11, [2013] IRLR 48, the Court applied its decision in the *Land Tirol* case by analogy in a case concerning the WTD. The claimant was laid off for some months (the actual phrase used is "zero hours short-time working") and eventually dismissed. He brought a claim for a payment in lieu of untaken holiday during the period he was laid off. His employer contended that he had accrued no entitlement to annual leave during the period when he had not been working. The Court accepted that contention. It said that his situation was comparable to that of a part-time worker (see paras. 32-33); that the principles of the PTWD, and specifically "the rule of *pro rata temporis*", should be applied (see para. 34); and accordingly that he had accrued no holiday entitlement during the period that he was not working. Its conclusion, at para. 36 was:

> "It follows … that the answer to the first question must be that Article 31(2) of the Charter and Article 7(1) of Directive 2003/88 must be interpreted as meaning that they do not preclude national legislation or

> practice … under which the paid annual leave of a worker on short-time working is calculated according to the rule of *pro rata temporis*."

40. That decision, as Mr Glyn put it, set the direction of travel as regards the Court's approach to the calculation of holiday entitlement, but the case on which he primarily relied is *Greenfield v The Care Bureau Ltd* C-219/14, [2016] ICR 161. The claimant was employed as a carer on a zero-hours contract under which her working patterns varied from time to time. Her leave year ran from 15 June. Her employment terminated on 28 May 2013. At the start of her final leave year, i.e. on 15 June 2012, she was working one day a week, but as from August she began to work full-time. At the end of June and beginning of July, i.e. while she was still working the old pattern, she took seven days of paid leave. In November 2012 she requested a week of paid leave. Her employers told her that, since her leave entitlement was calculated at the point that leave was taken, the seven days that she had taken in June/July, when she was still working only one day a week, had exhausted her entitlement. It was her case, as summarised at para. 22 of the judgment of the CJEU (p. 166 C-D), that:

> "… [N]ational law, read in conjunction with EU law, requires that leave already accrued and taken should be retroactively recalculated and adjusted following an increase in working hours, for example, following a move from part-time to full-time work, so as to be proportional to the new number of working hours and not the hours worked at the time leave was taken."

The questions referred to the Court arising out of that submission were paraphrased by it at para. 25 of its judgment (p. 167 C-D) as follows:

> "… whether clause 4.2 of the Framework Agreement on part-time work and Article 7 of Directive 2003/88 on the organisation of working time must be interpreted as meaning that, in the event of an increase in the number of hours of work performed by a worker, the Member States are obliged to provide, or are prohibited from providing, that the entitlement to paid annual leave already accrued, and possibly taken, must be recalculated, if necessary retroactively, according to that worker's new work pattern and, if a recalculation must be performed, whether that relates only to the period during which the working time of the worker has increased, or to the whole leave year."

41. The Court began its consideration of those points by making some preliminary observations. Mr Glyn asked us to note in particular para. 29, which reads:

> "Furthermore, it is not disputed that the purpose of the entitlement to paid annual leave is to enable the worker to rest from carrying out the work he is required to do under his contract of employment (judgment in *KHS*, C-214/10, EU:C:2011:761, paragraph 31). *Consequently, the entitlement to paid annual leave accrues and must be calculated with regard to the work pattern specified in the contract* [emphasis supplied]."

The Court's substantive answer to the question then proceeds by three stages.

42. First, at paras. 30-32, it holds that the unit of time on the basis of which the calculation of entitlement to paid annual leave accrues should be "the days, hours and/or fractions of days or hours worked and specified in the contract of employment". In setting out the facts of Ms Greenfield's case the Court used hours (or fractions of hours) as the definitive unit: see, e.g., para. 14, where it sets out the total number of hours worked in her final leave year (1,729.5) and the number of hours of paid leave (62.84).

43. Secondly, at paras. 33-41 it holds that the accrual of entitlement to paid annual leave must be calculated according to the working pattern from time to time. The Court refers at paras. 33 and 34 to *Land Tirol* and *Brandes* and concludes at para. 35:

> "It follows that, as regards the accrual of entitlement to paid annual leave, it is necessary to distinguish periods during which the worker worked according to different work patterns, the number of units of annual leave accumulated in relation to the number of units worked to be calculated for each period separately."

Mr Glyn relies on that paragraph as fundamental to his submissions, because it clearly prescribes an approach under which entitlement to paid annual leave accrues with each unit of time worked: usually, he said, the appropriate unit would be an hour.

44. The Court then goes on to explain how that conclusion fits with the "*pro rata temporis*" principle in the PTWD. It says that although that principle applies to the accrual of annual leave for part-time workers it cannot apply retroactively: that is of course consistent with the period-by-period approach enjoined in para. 35 and with what it had already held in *Heimann*. I should, however, note that at paras. 38 and 39 it says that there is nothing to prevent member states in their domestic legislation adopting a more favourable approach and allowing retrospective recalculation of annual leave entitlement when workers change to a working pattern with more hours.

45. Third, at paras. 42-43 the Court applies its previous conclusions to Ms Greenfield's case (or, more precisely, respecting the generalised character of a reference, to a case "such as" hers). It followed from para. 35 that no such recalculation as she was contending for was required.

46. The Court's formal answer to the questions referred, at para. 44 reads:

> "Having regard to all the above considerations, the answer to Questions 1 to 3 is that clause 4.2 of the Framework Agreement on part-time work and Article 7 of Directive 2003/88 must be interpreted as meaning that, in the event of an increase in the number of hours of work performed by a worker, the Member States are not obliged to provide that the entitlement to paid annual leave already accrued, and possibly taken, must be recalculated retroactively according to that worker's new work pattern. A new calculation must, however, be performed for the period during which working time increased."

47. The next case in point of time to which we were referred is *Tribunalul Botosani v Dicu* C-12/17, [2018] IRLR 1175; but its conclusions sufficiently appear from the final case, *Hein v Albert Holzkamm GmbH & Co. KG* C-385/17.

48. In *Hein* the claimant had a long period of short-time working. Under the collective agreement which governed entitlement to paid annual leave, his entitlement was calculated by reference to average earnings during the thirteen weeks immediately prior to the start of the leave; that average was then converted into an annual figure, of which the employee was entitled to 14.25% (representing a figure of 11.4% required by German law plus a negotiated 25% uplift). The period of short-time working in the reference period depressed the amount paid to Mr Hein in respect of annual leave. He contended that that was contrary to the requirements of the WTD.

49. In addressing that contention the Court at para. 25 of its judgment said that it was necessary to consider separately (1) the period of annual leave to which the claimant was entitled, and (2) the payment that he should receive in respect of that period.

50. As to (1), the essence of the Court's conclusion is at para. 27 of its judgment, where it says, citing *Dicu*:

> "entitlement to paid annual leave must, in principle, be calculated by reference to the periods of actual work completed under the employment contract."

That of course reflects *Greenfield*. Accordingly, the employer had been entitled to calculate the claimant's leave entitlement by reference to the reduced periods of work. However, at para. 30 it again made the point that nothing in the WTD prevented member states from according more favourable rights.

51. As to (2), the Court pointed out at paras. 33-37 of its judgment that it is a fundamental principle of the WTD that during any periods of annual leave a worker is entitled to their normal remuneration – that is, "remuneration comparable to periods of work": it refers to its previous judgments in *Robertson-Steele v R D Retail Services Ltd* C-131/04, [2006] ICR 932, (at para. 50) and *British Airways plc v Williams* C-155/10, [2012] ICR 847, (at para. 19). It followed that the remuneration that the claimant received in respect of his (reduced) period of leave should not itself be reduced. In its formal answer to the referred question, at para. 53, it said:

> "… [I]t is for the referring court to interpret the national legislation, so far as possible, in the light of the wording and the purpose of Directive 2003/88, in such a way that *the remuneration for annual leave paid to workers* in respect of the minimum annual leave provided for in Article 7(1) *is not less than the average of the normal remuneration received by those workers during periods of actual work* [emphasis supplied]."

52. *Hein* therefore, as trailed at para. 12 above, makes a clear distinction between the entitlement to annual leave, which accrues in proportion to actual work done, and pay in respect of such leave, which must be calculated by reference to remuneration during periods of actual work.

53. Mr Glyn submits that the authorities – and most particularly *Greenfield* – establish that as a matter of EU law entitlement to annual leave accrues in step with the relevant units of work. It follows that if, like the Claimant, you do less than a full year's work you should get less than a full year's holiday entitlement/pay.

The Domestic Law Case

54. The essential inequity on which Mr Glyn relied was that the Claimant works only 32 weeks of the year and yet, on her case, was entitled to holiday/holiday pay calculated on the same basis as if she worked 46.4 weeks. To put the same point another way, the holiday pay to which, on her case, she was entitled would be a much higher proportion of her actual earnings than if she worked full-time: on the basis of a 32-week year it would be 17.5%, while the holiday pay of a full-year worker is, as we have seen, only 12.07% of their earnings. The basic understanding of working life is that you get paid for the time you work, and the Secretary of State when making the WTR cannot, he submitted, have intended anything different as regards holiday pay.

55. Mr Glyn pointed out that the Claimant's reading of the legislation would produce still greater anomalies in the case of employees with, like her, permanent but zero-hours contracts who worked for even smaller proportions of the year. He gave as examples a school cricket coach, who would only work for one term, or invigilators, who worked only during the exam season. In principle you could have a permanent employee who worked only one week of the year, for which he or she earned, say, £1,000, and who would then be entitled to 5.6 weeks (notional) annual leave, for which they would receive £5,600.

Supporting Points

56. Mr Glyn submitted that the need to apply the principle of pro-rating was supported by the terms of the Explanatory Memorandum accompanying the 2007 Regulations which introduced the new regulation 13A. At para. 7.3 it described the consultation which had preceded the Regulations, and referred to the proposal as being "to increase the holiday entitlement from four weeks to 5.6 weeks (from 20 days to 28 days for someone working full-time, *pro rata for part timers* [emphasis supplied])". A similar statement appears in the regulatory impact assessment.

57. He also referred to the judgment of the Inner House, given by Lord Eassie, in *Russell v Transcocean International Resources Ltd* [2010] CSIH 82, [2011] IRLR 24. That case concerned offshore oil-rig workers who worked a pattern under which they had two weeks on the platform and two weeks off, so that they worked a total of 26 weeks per year. The issue was whether they were entitled to take their annual leave out of the weeks when they would otherwise be at work. It was held that they were not, and that decision was upheld by the Supreme Court ([2011] UKSC 57, [2012] ICR 185). That is not the issue before us – the Claimant accepts that her leave is taken in the school holidays – but Lord Eassie had occasion to consider the position of workers who only worked for part of a week. He said, at paras. 34-35 (pp. 29-30):

> "34. … [W]e see Article 7 of the WTD as requiring that there be provided to the worker within the year (which need not be a calendar year), at least four remunerated weeks of the weekly cycle in which he is free from work commitments.
>
> 35. On that reading of the WTD, those particular days during the employee's seven day working week on which the employee does not actually work are not generally reckonable towards annual leave. The point is perhaps best illustrated by the example, canvassed in argument,

> of the part time worker who may work three days per week - say Monday to Wednesday inclusive. Were the employer entitled to treat Thursdays as being weekly rest and Fridays and the weekend as annual leave, that would have the effect of requiring that part time worker to attend for work on each of the 52 weeks of the year. That, in our view, would infringe what is required of Member States by Article 7 of the WTD. What that article requires is that, within the leave year, there are at least four weekly cycles in which the part time worker is not required to turn up and put in his part time hours. *We would add that while the part time worker thus obtains four weeks in which he does not require to attend for work, the pro rata temporis principle still applies, because in terms of days of annual leave the part time worker receives the appropriate proportion of that which would be received by the full time worker within that weekly cycle* [emphasis supplied]."

(2) HOW TO GIVE EFFECT TO THE PRINCIPLE OF PRO-RATING

58. Mr Glyn proposed three alternative methods by which the WTR and/or the incorporated provisions of the 1996 Act could be read so as to give effect to the principle of pro-rating.

59. The first method was to pro-rate the multiplier in the calculation required by regulation 16 – that is, the figure of 5.6. Mr Glyn's submission was that that must be read as referring to the entitlement of a full-year worker subject to reduction pro rata in the case of a worker working less than a full year. Such a construction was necessary in order to conform to the WTD, which, as the CJEU cases showed, incorporated the principle of pro-rating.

60. The second method involved an adjustment to the multiplicand in regulation 16, namely "a week's pay", relying on section 229 (2) of the 1996 Act (see para. 23 above). That sub-section permits the remuneration to be taken into account for the purpose of any exercise under Chapter II to be "apportioned" where it relates to a period "which does not coincide with the periods for which [it is] calculated". Section 229 is not in fact one of the sections expressly incorporated by regulation 16 (2), but Mr Glyn contended that since it was expressed to be "supplementary" to the other provisions of Chapter II it could be regarded as incorporated indirectly. His essential submission was that since the right to annual leave was, necessarily, annual in character, a case where the holiday pay of a part-year worker was being calculated on the same basis as that of a full-year worker was caught by that provision, and the apportionment referred to should be made by applying the pro rata principle. He acknowledged that this alternative (unlike the other two) had not been proposed in the ET, but he said that that was not a reason for the Court not considering it now.

61. The third alternative worked via the concept of a "week", which is used by the WTR in relation to both the multiplier (annual leave of four plus 1.6 "weeks") and the multiplicand ("a week's pay"). Mr Glyn submitted that the word "week" connoted different amounts of actual working time depending on the pattern of work of a particular worker. A full-time worker would typically work five days in a week and, say, 40 hours; but the working "week" of a part-time worker might be only, say, two seven-hour days (14 hours) or five half-days (20 hours). And both full-time and part-time workers might have working patterns which varied from week to week or were

wholly irregular so that the amount of days or hours worked in a week were different from time to time. He submitted that in the case of casual workers (such as the Claimant) it was necessary to treat "week" in regulations 13, 13A and 16 and the incorporated provisions of the 1996 Act as referring to the average number of hours worked per calendar week over the annual leave year.

62. In so far as his case was based on the principle of pro-rating derived from the CJEU case-law, Mr Glyn invoked, so far as necessary, the *Marleasing* approach, which allows a strained construction of domestic legislation in order to give effect to the requirements of EU law. He acknowledged that that argument could only directly apply to regulation 13, because regulation 13A did not represent the implementation of any EU right; but he submitted that the Secretary of State in exercising his power to amend the WTR by adding the additional 1.6 weeks must have intended the new regulation 13A to be interpreted consistently with the existing regulation 13, to which it was avowedly "additional". In any event, however, he submitted that each of his alternative methods could be supported applying ordinary domestic principles of construction.

DISCUSSION AND CONCLUSION

63. I start by clearing some ground. Although the pro rata principle for which Mr Glyn contends is general in its application, it is important to appreciate that in this case we are concerned specifically with the position of part-year workers. We are not concerned with its application to workers who work part-time in the other sense noted at para. 2 (2) above, namely those who work throughout the year but for only part of the week. The position as regards entitlement to leave of such workers is, if I may say so, correctly analysed by Lord Eassie in the final sentence of the passage which I have quoted from his judgment in *Russell*. They are entitled under both the WTD and the WTR (ignoring, in the interest of simplicity, regulation 13A) to four weeks' annual leave. They are accorded that entitlement by being given four weeks in which they are not required to work at all, though of course all that they are actually relieved from having to work is the particular days in those weeks that they would have worked otherwise: in his example that is three days. In that sense their holiday entitlement amounts to only (in the example) twelve days, and the WTR do indeed, as he says, apply the pro rata principle. Lord Eassie could also have added, though it was not germane to the particular point that he was making, that the effect of regulation 16 was that the holiday pay to which such workers would be entitled for those weeks would be based on an average taken over twelve weeks in which they had likewise been working part-time, so that it would only represent three days' earnings and in that respect also would respect the pro rata principle. But that is not the issue here. In the 5.6 weeks of the school holidays that notionally constitute the Claimant's annual leave she is likewise only being relieved from working the number of hours for which she would have given lessons, and her holiday pay also will be based only on her earnings from such lessons. What we are concerned with is whether she should receive less than her entitlement, so calculated, in order to reflect the fact that she does not work throughout the year.

64. It follows from that that the passage cited by Mr Glyn from Lord Eassie's judgment does not assist him. The same goes for the Explanatory Memorandum referred to at para. 56. It is clear that the reference to "part-timers" is to workers working less than a full week. Mr Ford referred us to the Department of Trade and Industry consultation paper for the exercise to which the Memorandum is referring, which says (at p. 17):

> "A member of staff working part time two and a half days a week is currently entitled to 10 days' (four weeks') holiday per year. Increasing the statutory entitlement to 5.6 weeks would increase their entitlement to 14 days per year."

That is the sense in which the DTI is telling consultees that entitlement is "pro rata."

65. Mr Glyn would say that distinguishing between workers who work less than a full week and those who work less than a full year itself makes no sense: the pro rata principle means that both should earn leave entitlement only by reference to units of actual work. But that depends on whether a pro rata principle of that kind is indeed required, and I turn to that question, taking in turn his arguments based on EU law and on domestic law.

66. So far as EU law is concerned, I am prepared to accept that the CJEU authorities which Mr Glyn cites appear to establish that the WTD requires only that workers should accrue entitlement to paid annual leave in proportion to the time that they work. I will refer to this as "the accrual approach", but it is the justification also for what Mr Glyn calls the pro rata principle. The result is that employees who do not work a full year are not entitled to the full four weeks' annual leave provided for in article 7. That is perhaps a little surprising, given the explicit language of the Directive. The case-law has so far only shown how the principle applies in the particular situations thee considered: there may be difficulties in fleshing it out as a workable approach to be applied generally. Nevertheless I can understand the reasoning behind an accrual approach, and it seems that Germany at least has followed such a model in its domestic legislation: see para. 48 above.

67. It is important at this point to note that the accrual approach endorsed by the CJEU relates specifically to entitlement to annual leave and has no effect on the assessment of the remuneration to be paid in respect of that entitlement: that is part of what *Hein* decides. That is, as Mr Ford pointed out, an insuperable objection to Mr Glyn's second alternative mechanism for giving effect to the pro rata principle under the WTR (see para. 60 above), because that works by reducing the pay rather than the leave.

68. However, the EU case-law is not sufficient to get Mr Glyn home. The fact that the requirements of the WTD are satisfied by an accrual approach does not mean that such an approach is mandatory. On the contrary, as pointed out at para. 7 above, the WTD does not prescribe any particular mechanism for the assessment of holiday pay entitlement; and article 15 expressly provides that member states may accord workers entitlements which are more favourable than those required by the Directive itself. That point is also made by the CJEU in both *Greenfield* and *Hein* – see paras. 44 and 50 above. If it is clear that the UK legislation provides for a different model for assessing entitlement to annual leave that is unobjectionable, so long as it accords workers the minimum rights required by the WTD.

69. In short, there is in my view no requirement as a matter of EU law to give effect to the pro rata principle or, more particularly, to pro-rate the entitlement of part-year workers to that of full-year workers. The fact that the CJEU has endorsed an accrual approach remains, in principle, relevant to the construction of the domestic provisions but there is no need to strive to reach the same result and no justification for the deployment of *Marleasing.*

70. I accordingly turn to the domestic law argument. It may at first sight seem surprising that the holiday pay to which part-year workers are entitled represents a higher proportion of their annual earnings than in the case of full-year workers, but I am not persuaded that it is unprincipled or obviously unfair. It is important to appreciate that the workers in question are on permanent contracts. It does not seem to me unreasonable to treat that as a sufficient basis for fixing the quantum of holiday entitlement, irrespective of the number of hours, days or weeks that the worker may in fact have to perform under the contract: it is important not to lose sight of the fact that the actual days from which they will be relieved, and the quantum of their holiday pay, will reflect their actual working pattern: see para. 63 above. Mr Ford pointed out that the calculation of holiday entitlement would be a great deal more complicated, and might involve difficult factual questions, if it were necessary to assess not simply their earnings in the reference period (as required by section 224) but also the proportion of "full-year hours" that a part-year worker, or indeed any part-time worker, had worked in the year. How, for example, would what should count as full-year hours be identified ? It would also mean that it would be impossible for the worker or the employer to know the amount of accrued holiday entitlement until the end of the year. That was problematic in itself but would also cause particular problems in the application of the formula in regulation 14 for assessing the amounts due in lieu of untaken holiday on termination (see para. 17 above): how would you quantify "element A" in the formula ? It may be possible to find an answer to these difficulties[9], but they illustrate why there is an attraction to having the same entitlement for all permanent employees.

71. I accept that applying the terms of the WTR without a pro rata reduction for part-year workers will produce odd results in extreme cases such as those of the cricket coach or the invigilators relied on by Mr Glyn; but general rules sometimes produce such anomalies when applied in untypical cases. I would expect it to be unusual for workers whose services are required for only a few weeks a year to be employed on permanent contracts, as opposed to being engaged on a freelance basis. We were told that schools sometimes resort to this expedient because the requirements for safeguarding clearance via the Disclosure and Barring Service are less onerous in the case of permanent employees. The ET made no findings on the point, and the details were not explained to us; but even if it is correct it does not seem to me particularly inequitable that employers who choose to retain on permanent contracts workers whom they could have engaged freelance, because doing so has particular advantages, should have to accept the additional costs that come with that choice. In any event, whether the practice is common or not, the arguably anomalous entitlements of workers of this kind do not seem to me to be sufficient to require the application of the pro rata principle generally. I would add that the application of such a principle might itself produce perceived inequities: would it feel right that a worker who works a five-hour day should receive only 3½ weeks holiday (5.6 x 5/8) ?

72. For those reasons I do not believe that it is necessary to approach the construction of the WTR on the basis that they must be taken to incorporate the pro rata principle.

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[9] As regards regulation 14, for example, Mr Glyn said that element A would in the Claimant's case be 3.86 weeks, on the basis that she worked 32 weeks (cf. para. 33 above). That is consistent with his case, but it depends on it being known how many weeks would have been worked in that particular leave year. In the case of a school that would probably be unproblematic, but that would not necessarily be so for other kinds of employment.

73. Once that point is reached it seems to me plain that the EAT reached the right decision. On any natural construction the WTR make no provision for pro-rating. They simply require, as the Claimant says, the straightforward exercise of identifying a week's pay in accordance with the provisions of sections 221-224 and multiplying that figure by 5.6. Attempting to build in a pro-rating requirement or an accrual system would not, as Mr Ford submitted, be an exercise in construction (even of the *Marleasing* type, were that available) but the substitution of an entirely different scheme.

74. It follows that there is no need to examine the mechanisms which Mr Glyn advances for incorporating the pro rata principle into the provisions of the WTR. They all involve doing violence to the statutory language of a kind which could only be justified, if at all, on a *Marleasing* approach: that is vividly illustrated by the re-writing of regulation 16 (3) (d) accepted by the ET (see para. 33 above). As to Mr Glyn's second alternative, I have already observed that it would seem to be ruled out as a matter of EU law because it involves applying a reduction to the Claimant's normal level of earnings. I wish to add, however, that I do not think it works even in its own terms. The language of section 229 (2) is frankly rather opaque, but I think it is sufficiently clear that it is designed to cover the situation where a payment is made inside the twelve-week period which reflects work done for a longer period: the obvious example is an annual bonus. It is certainly not intended to give the tribunal a general power to substitute a wholly different mechanism for calculating remuneration than that which the substantive provisions of Chapter II enact.

75. Those are my principal reasons for rejecting the Trust's case. They correspond very largely to Mr Ford's thoughtful submissions. He made two other supporting submissions which I need only mention briefly but which I believe have some force.

76. First, he pointed out that the WTR do in fact expressly adopt an accrual system as regards entitlement to annual leave, but only as regards the first year of employment: see regulation 15A (para. 18 above). That means that it is all the more difficult to treat such a system as applying by implication in the following years.

77. Secondly, he pointed out that the logic of the Trust's case was that in *Russell* (see para. 57 above) the claimants should have been entitled to only (about) half of the statutory entitlement since they only worked 26 weeks a year. That seems unattractive, given the special characteristics of offshore oil rig work which underlie that working pattern, and the case proceeded in both the Inner House and the Supreme Court on the basis that they were entitled to the full statutory holiday (and thus the appropriate pay): the only question was when it could be taken. Not much weight can be attached to the fact that a Court does not take a point not raised by the parties. But the case does at least illustrate that the circumstances of part-year workers may vary very widely and that a pro rata principle that is said to make sense in the case of the cricket coach or the visiting music teacher must also make sense across the whole spectrum of working arrangements.

DISPOSAL

78. I would dismiss this appeal. Although the reasoning above has had at times to be somewhat dense, my basic reasoning can be summarised shortly. The WTR do not provide for the kind of pro-rating for which the Trust argues and which underlies the application of the 12.07% formula in the case of a part-year worker. The exercise

required by regulation 16 and the incorporated provisions of the 1996 Act is straightforward and should be followed.

Lord Justice Hamblen:

79. I agree.

Lord Justice Moylan:

80. I also agree.